

ance in time. That omission alone was sufficient for me to decide to dismiss the application. In any event the 1st defendant has not shown that he has any defence on merits. Invoking the arbitration clause does not provide the 1st defendant with a defence in that he has not shown that there has been any dispute or difference between the plaintiff and him. He has not contended that the amount claimed against him is in fact not owing.

In *London and North Western Railway v. Jones*,⁽¹⁾ Rowlatt J. said:

"It is now quite clear from the decisions in *London and North Western Ry. Co. v. Donellan*, and *Midland Ry. Co. v. Loseby* that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry. Cos. v. Billington*, where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to."

The learned editors of *Russell on Arbitration* 17th Edition cited the aforesaid judgment of Rowlatt J. in support of their contention that "Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation."

The application had to be and was dismissed with costs.

Application dismissed.

Solicitors : *Gurdial Singh & Co.; Shook Lin & Bok.*

A KOH SIAK POH v. PERKAYUAN O.K.S. SDN. BHD.

[O.C.J. (George J.) November 16 & December 19, 1984]

[Kuala Lumpur – Civil Suit No. C 2103 of 1984]

B *Contract – Contract for felling logs – Breach of contract – Application for specific performance and injunction – Application to set aside injunction.*

In this case the Kelantan State Economic Development Corporation (SEDC) granted a timber concession to the defendants (OKS) who in turn entered into an agreement with the plaintiff (contractor) to fell logs and remove timber from particular portions of the concession. On July 9, 1984 the contractor caused the writ to issue against OKS for the following claims:

- (1) An order for specific performance by the defendants of the terms and conditions of the agreement.
- D (2) Defendants be restrained by injunction from removing or selling timber felled by the plaintiff without the previous written consent of the plaintiff.
- (3) Damages, cost and further or other relief.

The plaintiff caused a Summons-in-Chamber to be issued and with the aid of a certificate of urgency had it heard *ex parte* and an injunction was issued in terms of the prayer of the plaintiff coupled with an order that the defendants be restrained from moving or in any way dealing with about 1800 tons of cut timber lying at the Railway Station yard at Gua Musang until further order of Court.

F The defendants did not enter appearance within the usual eight days and the plaintiff obtained an order from the court to move and deal with the cut timber lying in Gua Musang Railway Station. The plaintiff took possession of and sold the timber.

Three days later the defendants filed their application and asked for the interim injunction to be set aside and for damages. The grounds on which the defendants rely were not set out in the summons as is required by the Rules (Order 32 rule 1 and Form 62).

H Held: (1) under the terms of the contract it was for the plaintiff to fell log and remove timber from the contract area. Since the plaintiff had already taken possession of the timber and sold it, setting aside that part of the order restraining the defendants from moving or dealing with that timber serves no purpose;

(2) so long as the contract subsists, there is no reason for the defendants to complain that they are restrained from committing breaches of it.

CIVIL SUIT.

I

Dominic Puthuchearry (K. Y. Foo with him) for the defendants/applicants.

Mahinder Singh Dulku for the plaintiff/respondent.

Cur. Adv. Vult.

George J. : The Kelantan State Economic Development Corporation (SEDC) apparently had the power to do so and granted a timber concession to the defendants (OKS) who in turn entered into a written agreement dated October 16, 1982 with the plaintiff (contractor) whereby the plaintiff was required to fell log and remove timber from particular portions of the concession. The written agreement has to be read with particular attention to the following clauses reproduced here:

"4. OKS shall forthwith apply for all necessary licences and permits from the relevant authorities to enable the Contractor his servants agents and workmen to enter and carry out felling logging and removal of timber in the Contract Area. OKS shall further mark out the boundary of the Contract Area as expeditiously as possible.

5. The Contractor covenants and agrees to commence felling logging and removing timber from the Contract Area within fourteen (14) days of receipt of notice from OKS that the necessary licences and permits have been obtained from the relevant authorities.

6. The sale and the proceeds of sale of all timber felled logged and removed by the Contractor from the Contract Area shall be governed and distributed monthly as follows:

- (1) each of the parties hereto shall be entitled to sell half of all such timber to its/his purchasers at the prevailing local market price;
- (2) OKS shall be entitled to retain twenty (20%) per centum of the gross proceeds of sale of all timber sold by the parties hereto;
- (3) after payment thereof to OKS as mentioned in (2) aforesaid OKS shall utilise the balance thereof firstly to pay all royalty and premium payable to the Kelantan State Government and SEDC secondly to pay all operational expenses of the Contractor and lastly to pay any remaining balance to the Contractor."

"10. The Contractor shall keep true and accurate records of all timber fell logged removed as well as records of timber sold prices and purchasers.

11. If the Contractor shall make default in any of the following respects, viz:

- (i) if without unreasonable cause he wholly suspends the carrying out of the felling logging and removing of timber in the Contract Area before completion thereof; and
- (ii) if he fails to observe or perform and comply with any of the provisions in this Agreement or in the Main Contract so far as they relate to the felling logging and removing of timber in the Contract Area;

then and if such default shall continue for ten (10) days after a notice specifying the default has been given by OKS to him OKS may without prejudice to any other rights or remedies thereupon by notice terminate summarily the employment of the Contractor under this Agreement."

A On July 9, 1984 the contractor caused the writ herein to issue against OKS indorsed for the following claims:

- B "1. An order for specific performance by the defendant of the terms and conditions of the agreement dated October 16, 1982 made between the plaintiff on the one part and the defendant on the other part.
- C 2. An order that the defendant whether by itself or its servants or agents or anyone of them or otherwise be restrained by injunction until Judgment in this action or until further order from doing the following acts or any of them that is to say, from removing from that portion of the concession area contracted out to the plaintiff timber felled by the plaintiff and/or his contractor without the previous written consent of the plaintiff, and from disposing to third parties or dealing with that portion of the concession area contracted out to the plaintiff without the written consent of the plaintiff.
- D 3. Damages for breach of contract.
4. Costs.
5. Further or other relief."

E The writ was served on the defendants on July 11, 1984.

The defendants were given the usual eight days to enter an appearance. They entered an appearance only ten days after the service on them of the writ.

F In the meantime the plaintiff had on the very day that the writ was issued caused a summons-in-chambers to be issued and with the aid of a certificate of urgency had it heard *ex parte* that very afternoon when upon the usual undertakings in respect of damages I ordered and directed

G "that the defendants PERKAYUAN O.K.S. SDN. BHD. whether by itself or its servants or agents or anyone of them or otherwise be restrained by injunction until Judgment in this action or until further order from doing the following acts or any of them that is to say, from removing from that portion of the concession area contracted out to the plaintiff timber felled by the plaintiff and/or his contractor without the previous written consent of the plaintiff and from disposing to third parties or dealing with that portion of the concession area contracted out to the plaintiff without the written consent of the plaintiff AND IT IS ORDERED that the defendants whether by itself or its servants or agents be restrained from moving or in any way dealing with the approximate amount of 1,800 tons of cut timber which is now lying at the Railway Station yard at Gua Musang until further Order of Court AND IT IS LASTLY ORDERED that the costs of this application be costs in the cause."

The plaintiff had supported his application for the interim injunction by his affidavit affirmed on

July 9, 1984 wherein he stated, *inter alia*, that the defendants had without his knowledge and consent and without his authority taken away some 1,800 tons of cut timber that had been felled and logged by him and estimated by him to be worth some \$500,000.00. He also complained that the defendants had allowed other persons to enter into and fell trees in the concession area that the defendants had contracted out to the plaintiff. He had said that these acts of the defendants were in breach of the terms of the contract and was causing him irrevocable damage.

When the defendants had not entered an appearance to the writ within the prescribed eight days the plaintiff came back to the Court and on July 20, 1984 an order was made giving the plaintiff liberty to "move and/or deal with" the said cut timber which apparently had been located at Gua Musang Railway Station. The plaintiff took possession of and sold the timber.

On July 23, 1984 the defendants filed their application which is the matter now before me whereby they ask for the interim injunction to be set aside and they ask for damages. The grounds they rely on are not set out in the summons as is required by the Rules – see Order 32 rule 1 and Form 62. It is further noted that the defendants have not made any indorsement in the summons to the effect that they would be relying on any supporting affidavit.

En passant I pause to observe that there appears to me to be a lamentable prevalence for solicitors to ignore the requirements of the procedural rules and to lean heavily on the Court's inherent powers reiterated in Order 92 rule 4 of the Rules of High Court.

The affidavits that were read in support of the defendants' application were that of one Datuk Ong Kian Seng, the Managing Director of the defendant company affirmed and filed on September 17, 1984 and of one Ong Teng Buey affirmed on September 17, and filed on the 18th.

That the defendants had entered into the written agreement of October 16, 1982 with the plaintiff and that that agreement continues to subsist is admitted by Datuk Ong. That the defendants had removed the cut timber (but said to be some 1,300 tons and not 1,800 tons) is also admitted.

Since the plaintiff had already taken possession of the timber at Gua Musang and had sold it, set-

A ting aside that part of the order restraining the defendants from moving or dealing with that timber serves no purpose. In any event under the terms of the contract it was for the plaintiff "to fell log and remove timber from the Contract Area". Under the terms of the contract the defendants had no business removing the cut timber as they did and having done so without informing the plaintiff that they were going to do so, the plaintiff was perfectly justified in moving the Court *ex parte* for the interim injunction.

C As to the other part of the order which is the first limb of the interim injunction, it does nothing more than restrain the defendants from committing breaches of the terms of the contract and so long as the contract subsists I can see no reason for the defendants to complain that they are restrained from committing breaches of it.

D In the circumstances I see no call for me at this stage to go any deeper into the matter.

The application is dismissed with costs.

E *Application dismissed.*

Solicitors : K.Y. Foo & Co.; Mahinder Singh Dulku.

F

PERCETAKAN SOLAI SDN. BHD. v. KIN KWOK DAILY NEWS SDN. BHD. & ANOR.

G [O.C.J. (George J.) November 21, 22 & December 19, 1984]

[Kuala Lumpur – Suit No. C 1888 of 1982]

H *Contract – Compromise of claim – Two options given to one party – One option allowed to pass – Second option to be exercised within reasonable time.*

I In this case the plaintiff company had been selling printing material and newsprint to the first defendant company. There was some dispute as to the actual amount due to the plaintiff. Finally parties entered into a compromise agreement and the defendants agreed that the total value of goods received by them amounted to \$1,475,000. The plaintiff agreed to permit the defendants to pay 45% of the said amount in 24 monthly equal instalments commencing from February 25, 1981 or within one month after the audit of the accounts of the defendant company and approved by the Board of Directors. In case of default in the payment of one or any instalment for a period of 30 days after the same had become due, the whole of the